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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

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SUPREME COURT, U.S.

CHARLIE L. BURR,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondent objects to Petitioner's statement of the question presented as being predicated upon speculation and misinterpretation, and consequently restates said question as follows:

> WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS VIOLATIVE OF THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS ENUNCIATED IN THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) AND EDDINGS V. OKLAHOMA, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

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PRELIMINARY STATEMENT

Charlie Lewis Burr, the criminal defendant and appellant below will be referred to herein as Petitioner. The State of Florida, the prosecution and appellee below will be referred to herein as Respondent. Attached hereto is an appendix containing the opinion of the Florida Supreme Court and other pertinent documents. Citations to the appendix will be indicated parenthetically as "A" with the appropriate page number(s). Citations to the petition for writ of certiorari will be indicated parenthetically as "P" with the appropriate page number(s).

OPINION BELOW

Petitioner seeks review of the Florida Supreme Court's opinion affirming his judgment and sentence of death. The opinion is reported as Burr v. State, 466 So.2d 1051 (Fla. 1985) (A 1-5).

JURISDICTION

Petitioner seeks review pursuant to 28 U.S.C. § 1257(3). The judgment below was entered on February 14, 1985, and Petitioner's timely motion for rehearing was denied on April 26, 1985 (A 1,6). This Court has jurisdiction only to the extent that it finds a substantial federal question is presented.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The instant case involves a death sentence imposed pursuant to Florida Statutes § 921.141 (1983). While Petitioner asserts that the issue raised herein presents a constitutional question under the Eighth and Fourteenth Amendments to the United States Constitution, Respondent contends the contrary.

STATEMENT OF THE CASE

Citations to the sequentially numbered record on appeal will be indicated parenthetically as "R" with the appropriate page number(s).

Respondent objects to Petitioner's statement that "[o]ther witnesses testified for the defense, bolstering Williams' defense testimony," (P 1), as being argumentative and conclusory.

Petitioner's representation that Florida Supreme Court Justices McDonald and Overton consented to the court's affirmance of the death sentence without filing an opinion is incorrect (P 2). Justices McDonald and Overton concurred in the conviction, but dissented from the sentence without opinion. Burr v. State, 466 So.2d 1051,1055 (Fla. 1985).

Respondent objects to Petitioner's statement that "[t]he Supreme Court expressly rejected, as a matter of law, doubt as to guilt as a reasonable basis for recommending and imposing a life sentence," (P 2), as being argumentative and conclusory. For the same reasons, Respondent objects to Petitioner's statement to the effect that the ambiguity in Domita Williams' testimony was sufficient to raise some doubt of Burr's guilt sufficient to prevent the trial court from imposing death (P 3).

Respondent objects to Petitioner's statement that "[t]he prosecutor admitted what Williams said about what happened on the morning of trial was true". (P 8 n.1). The record reflects that this assertion was derived from the manner in which the prosecutor phrased the questions he posed to Williams rather than from an explicit admission (R 1254,1255).

Respondent, for the purpose of resolving the issue raised herein, accepts as accurate, though incomplete, the

remainder of Petitioner's Statement of the Case (P 1-3) and Statement of the Facts (P 3-9) and therefore submits the following additional information:

Domita Williams testified that she knew the victim as "Steve" because she had stopped there before (R 834); that she and Petitioner arrived at the store "roughly around 7:00 [a.m.], a little after 7:00 [a.m.], a little before . . ." (R 834); that no one besides the clerk was in the convenience store while she and Petitioner were there and no one was in the parking lot area (R 835); that she could, in fact, see Petitioner and the victim from the car, upper part only, and, after hearing a gunshot, she looked up again and saw Petitioner, but not the victim (R 836,837; 852,853); that she was crying because "he [Petitioner] had shot Steve" and she had "never witnessed anything like that before . . ." (R 837); that Petitioner was wearing blue jeans and a "Master Red" shirt at the time (R 838) [Williams also identified State's Exhibit number one as being Petitioner's shirt (R 839)]; and that the gun imprint she noticed in Petitioner's pocket was a pistol-type handgun (R 838).

Williams further testified that after the incident at the convenience store she and Petitioner drove to an apartment where Petitioner was staying with Katrine Jackson and her family. (R 840). Williams sat down and told Katrine Jackson and Tammy Footman, who were present in the apartment, what had happened at the store and what she had seen. (R 840).

Subsequent to the apartment visit, Williams was taken to work at Sunland by Petitioner and once there she told her supervisor, Katherine Haygood, about the incident at the store, but she did not tell her the truth about what happened (R 841).

Williams specifically stated that she did not drive her mother to work on August 20, 1981 and that her mother had driven her own car to work that day. (R 845). She also testified that someone, not named at the time, had tried to get her to change her testimony, but that her testimony before the jury was true (R 845).

On cross-examination it was established that Williams was afraid of Petitioner and apparently feared for her baby. (R 856,857). Williams denied telling her mother or anyone else that she had lied in her statement to Charlie Ash and that her mother was lying about August 20, 1981. (R 858-861).

On re-direct examination Williams explained her fear of Petitioner and testified that Petitioner did not run out of the store after the shooting, nor did he drive away rapidly from the store. (R 863).

After Domita Williams testified for the defense and recanted her previous testimony (R 1266-1286), it was revealed during cross-examination that Williams disputed that she had ever told Katherine Haygood, her supervisor, that she had been in the Suwannee Swifty the morning of the robbery/murder (R 1136,1137; compare to 1286-1288); she admitted her mother was pressuring her to change her testimony (R 1288); she never saw the ambulance Ruth and Valerie Grant claimed they saw at the same time they saw Domita in her mother's car (R 1289); she admitted that when she gave her original statement to Charlie Ash she knew Katrine Jackson and Tammy Footman had previously given statements, but did not know the content of their statements (R 1290,1291); she couldn't explain the "cheeseburger story" away . . . how it cropped up in everyone's statements (R 1292-1294); she was aware that "[m]urder, you can get the

chair" and "[p]erjury, I don't know what you can get" (R 1294); she admitted saying no threats were made when she gave her statement (R 1295); she acknowledged that her deposition testimony (where no threats were made) was consistent with her statement (R 1296,1297); she acknowledged that her Grand Jury testimony (where no threats were made) was the same (R 1297,1298); she acknowledged discussing her expected trial testimony with the prosecutor the Friday before trial (where no threats were made) and it was the same (R 1298,1299); she acknowledged that Mr. Meggs had never threatened her or acted mean to her (R 1299); she verified that although Mr. Modesitt used strong language, Mr. Meggs only emphasized "the importance of telling the truth" (R 1302); she stated that "after [she] found out that they didn't have any evidence against [Petitioner]," that at that point she decided to "tell the truth" (R 1303-1304); that Mr. Meggs calmed her down and she agreed that her original statement was true (R 1304,1305); she told Mr. Meggs that she was scared and people were trying to persuade her to change her testimony and Mr. Modesitt apologized to her (R 1305); she acknowledged that she had received a call from defense counsel after her original trial testimony and but for that call she didn't "think" she would have returned and recanted her original testimony (R 1307); she emphasized once again that she was scared of Petitioner for herself and for her baby (R 1307,1308); and she denied ever discussing the Suwannee Swifty incident in the presence of Petitioner and Darrell Footman (R 1309; compare to R 1140-1144).

Leola Powell testified as the first rebuttal witness. She saw Petitioner's car at Williams' house between 6:30 a.m. and 7:00 a.m. August 20, 1982 (R 1335). At 7:45 a.m.

the car was gone (R 1336,1337).

Tammy Footman's testimonv was proffered because it was agreed that she had heard the previous day's testimony, but not Williams' recantation. (R 1320,1322,1323,1324,1325, 1342,1352). Petitioner's counsel suggested the proffer and at its conclusion admitted the testimony was "along the lines of her statement". (R 1325,1351). Footman was allowed to testify and in the process verified Katrine Jackson's prior testimony and specifically stated that Williams told her the "cheeseburger story" the morning of the incident (R 1357,1358-1361).

Ray Wood testified that the ambulance was already at the Suwannee Swifty when he arrived at 7:21 a.m. on the morning of the robbery/murder and that no ropes were strung until at least 7:30 a.m. (R 1367-1369).

Charlie Ash was recalled and imparted the details of his investigation (R 1370-1373). He knew Williams had information after talking to Katrine Jackson and Tammy Footman, but he never told Williams what they had stated (R 1376-1378). Williams' mother was hostile (R 1374) and he got no response from her when he asked how she knew if her daughter knew something about the Suwannee Swifty incident (R 1374,1375). Ash denied ever threatening Domita Williams (R 1375). The taped interview he conducted with Williams was played for the jury for the purpose of determining the atmospere of that statement (R 1382,1386). The State rested and all testimony concluded.

At the sentencing hearing, the jury witnessed an impassioned, tearful plea by Petitioner's mother that the jury advise the trial court to spare his life (R 319, See also R 451,452,455).

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

Respondent rejects Petitioner's reference to his argument concerning Domita Williams' testimony as being irrelevant to the manner in which the issue presented herein was raised below. Respondent concurs with Petitioner's representation concerning his presentation of his "doubt as to guilt" claim to the Florida Supreme Court, but contends that the court perceived and resolved the issue as one resting solely on state grounds, to-wit: whether "doubt as to guilt" constituted sufficient basis to conclude that the trial judge's override was improper under the Tedder test (See footnote 2, infra). The Florida Supreme Court concluded that it was not.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

QUESTION PRESENTED

WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS VIOLATIVE OF THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS ENUNCIATED IN THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) AND EDDINGS V. OKLAHOMA, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

Implicit in Petitioner's statement of the question presented (P i) is his recognition of the fact that he must establish that the Florida Supreme Court's decision herein resolved a federal question in a manner in conflict with this Court's decisions in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), as a basis for invoking this Court's certiorari jurisdiction. See Supreme Court Rules 17.1(c). Respondent submits that the allegedly offending portion of the Supreme Court's decision does not present a federal question and in any event said decision is not violative of the requirements of the Eighth and Fourteenth Amendments as set forth in Lockett v. Ohio, supra, and Eddings v. Oklahoma, supra.

Initially, Respondent contends that Petitioner's version of the question presented, which on its face would entitle him to review if answered affirmatively, misses the mark because it is erroneously predicated upon premises fallaciously derived from speculation on the one hand, and misinterpretation on the other. Specifically, Petitioner first asserts that the jury's life recommendation "was based solely upon their doubt as to Burr's guilt." (P i).

This assertion represents speculation in its purest form since unlike the trial judge who reduces to writing the factual basis for imposition of a death sentence, Florida Statutes § 921.141(3), the jury's recommendation is not accompanied by a written statement setting forth the factual basis therefor (see R 292). Thus, Petitioner, not having been privy to the jury's deliberations, has absolutely no foundation for his assertion. Indeed, if Respondent engaged in such speculation, it could, on equally sound footing, state that the jury's life recommendation, rather than arising from doubt as to guilt since they had already found Petitioner guilty beyond a reasonable doubt, was instead occasioned by the emotional display of Petitioner's mother at the sentencing proceeding (R 319,451,452,455), which certainly would not, by any stretch of the imagination, qualify as a relevant mitigating factor under Lockett and Eddings.

While Petitioner's reliance upon such a faulty premise is cause for concern, even more alarming is the position he advances on the authority of Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981), King v. Strickland, 36 Cr.L.Rptr. 2251, Case No. 82-5306 (11th Cir. Dec.3, 1984), and Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984).[1]

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[1]None of these cases addressed the issue of whether "doubt as to guilt" constitutes a sufficient basis under Tedder v. State, infra, to reverse a trial judge's override of a jury life recommendation. Smith v. Balkcom, involved inter alia, a claim that a death qualified jury violated the defendant's rights under the Sixth and Fourteenth Amendments. King v. Strickland and Smith v. Wainwright yielded the language quoted by Petitioner in their treatment of ineffective assistance of counsel claims.

Apparently Petitioner suggests that where a possibility of lingering or whimsical doubt as to guilt exists, a jury override could never be sustained under the Tedder test (see footnote 2, infra). If this is the case, the Tedder test, rather than being a barrier to judicial caprice, becomes an absolute bar to the exercise of a statutory duty. In effect, Petitioner urges the creation, by judicial fiat, of a per se rule of reversal--a practice which this Court has soundly condemned as an abdication of judicial responsibility. United States v. Hastings, ___ U.S.___, 103 S.Ct.___, 76 L.Ed.2d 96,106 (1983).

Secondly, Petitioner states that the Florida Supreme Court's opinion herein was violative of the Eighth and Fourteenth Amendments "as the Florida Supreme Court unconstitutionally limited the relevant evidence the jury could consider which reflected upon the character of the offense." (P i). Respondent maintains that the Florida Supreme Court's opinion is wholly devoid of any mandate operating to preclude defense counsel from arguing and the sentencer from considering "doubt as to guilt" in mitigation. Rather, the opinion indicates that "doubt as to guilt", when predicated upon the inconsistent testimony of a witness, the question of whose credibility had previously been resolved adversely to the defendant, does not constitute a sufficient basis upon which to conclude that the trial judge's override of the jury's life recommendation was improper under the standard of review set forth in Tedder v. State, 322 So.2d 908 (Fla. 1975).[2]

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[2] "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." Tedder v. State, supra at 910. See also Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290, 53 L.Ed.2d 344,357,358 (1977), where this Court characterized the Tedder test as "exacting standards" and "a crucial protection" that demonstrated that Florida's new death penalty statute affords significantly more safeguards to the defendant than did the old.

Accordingly, Respondent submits that, stripped of speculation and misinterpretation, the question presented is:

> WHETHER THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE TRIAL JUDGE'S OVERRIDE OF THE JURY'S LIFE RECOMMENDATION WAS VIOLATIVE OF THE REQUIREMENTS OF THE EIGHTH AND FOURTEENTH AMENDMENTS ENUNCIATED IN THIS COURT'S DECISIONS IN LOCKETT V. OHIO, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) AND EDDINGS V. OKLAHOMA, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982).

The portion of the Florida Supreme Court's opinion with which Petitioner takes issue is the following:

> Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." Buford v. State, 403 So.2d 943, 953 (Fla. 1981), cert. denied, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d. 319 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d. 295 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. See, e.g., Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99,S.Ct. 293, 58 L.Ed.2d 265 (1978). [Emphasis added.]

Burr v. State, 466 So.2d 1051,1054 (Fla. 1985). It is readily apparent from the above emphasized language and the court's citation of Stevens v. State, 419 So.2d 1058 (Fla. 1982), cert. denied, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983) and Hoy v. State, 353 So.2d 826 (Fla. 1977), cert. denied, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978), that the issue perceived and resolved by the court was whether, under the Tedder test, the trial judge's jury override was proper. The court concluded that it was, finding that there were several aggravating circumstances, no mitigating circumstances,[3] and no reasonable basis discernible from the record for the jury to recommend life. Burr v. State, supra at 1054. Thus, Respondent contends that the error, if any, lies in the Florida Supreme Court's upholding the jury override under the Tedder test--a putative error of state law. In Barclay v. Florida, ____ U.S.____, 103 S.Ct. ____, 77 L.Ed.2d 1134 (1983), where, as here, the petitioner's claim suggested that the Florida Supreme Court failed to properly apply its own cases in upholding his death sentence, this Court stated:

> The obvious answer to this question, as indicated in the previous discussion is that mere errors of state law are not the concern of this Court, Gryger v. Burke, 334 U.S. 728,731, 92 L.Ed. 1683, 68 S.Ct. 1256 (1948), unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.

Id. at 77 L.Ed.2d 1149. Similarly, in Spaziano v. Florida, 468 U.S. ____, 104 S.Ct. ____, 82 L.Ed.2d 340 (1984), this Court, speaking to the Tedder test, opined:

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[3]The trial judge, in his Findings of Fact for Sentence (R 311-320), stated: "Against this backdrop of aggravating circumstances, try as I may to find mitigating circumstances from the evidence, I cannot." (R 320).

> Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory.
>
> * * *
>
> It is not our function to decide whether we agree with the majority of the advisory jury or with the trial judge and the Florida Supreme Court. See Barclay v. Florida, ___ U.S., at ____, 77 L.Ed.2d 1134, 103 S.Ct. 3418 (Stevens, J., concurring in the judgment). Whether or not "reasonable people" could differ over the result here, we see nothing irrational or arbitrary about the imposition of the death penalty in this case.

Id. at 82 L.Ed.2d 356,357. Thus, Petitioner's claim, involving as it does, nothing more than a suggestion of an error in state law, leaves him without the proper basis to invoke this Court's certiorari jurisdiction. Barclay v. Florida, supra; Spaziano v. Florida, supra.

Respondent further argues that even if the Florida Supreme Court's rejection of "doubt as to guilt" as a ground to strike down the jury override on the facts of the case sub judice is construed to present a federal question, the court's decision is not in conflict with Lockett and Eddings.

Lockett and Eddings stand for the proposition that under the Eighth and Fourteenth Amendments, neither the state legislatures by statute, nor the state courts as a matter of law, can preclude the sentencer in capital cases from considering all relevant mitigating evidence. See Barclay v. Florida, supra, Stevens, J., concurring at 77 L.Ed.2d 1151, n.2. So, in order to establish the requisite conflict, the Florida Supreme Court's decision herein must necessarily operate, as a matter of law, to preclude

the capital sentencer from considering relevant mitigating evidence. Respondent contends that it does not for one significant reason.

This Court noted in Lockett v. Ohio, supra, "[n]othing in this opinion limits the traditional authority of a Court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." Id. at 57 L.Ed.2d 990, n.12. In the case at bar, Petitioner argues that the relevant mitigating evidence was "doubt as to guilt". This "relevant evidence" was supplied by Domita Williams' inconsistent testimony. Thus, "doubt as to guilt", on the facts of this case, can only be expressed in terms of her credibility, the question of which, as pointed out above, was resolved by the jury adversely to Petitioner during the guilt phase of the trial. The simple fact of the matter is that the previously resolved question of Domita Williams' credibility, aside from being purely a jury question, is an entirely irrelevant concern to the sentencer because it has absolutely no bearing upon Petitioner's character, prior record, or the circumstances of the offense. Moreover, the instant case does not present an Eddings issue in its truest form since the trial judge did not express a desire to consider "doubt as to guilt" as a mitigating factor and conclude that he was prohibited from doing so as a matter of law. Consequently, under Lockett and Eddings, neither the trial court nor the reviewing court committed a constitutional trespass in rejecting Petitioner's "doubt as to guilt" claim.

In sum, the writ should not be granted herein because Petitioner's claim presents nothing more than a putative error in state law which in turn is an insufficient

basis for the exercise of this Court's certiorari jurisdiction. Barclay v. Florida, supra; Spaziano v. Florida, supra. Additionally, even if Petitioner's claim was viewed as presenting a federal question controlled by Lockett and Eddings, the Florida Supreme Court's decision herein was in harmony, rather than conflict, with those cases thereby leaving Petitioner without a proper basis for invoking this Court's certiorari jurisdiction.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, Respondent respectfully requests this Honorable Court deny the instant petition for writ of certiorari.

Respectfully submitted:

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ATTORNEY GENERAL

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ASSISTANT ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to David A. Davis and Steven L. Bolotin, Assistant Public Defenders, Second Judicial Circuit, Post Office Box 671, Tallahassee, Florida, 32302 on this 24th day of July, 1985.

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT

APPENDIX

ront of the victim's chest, one one to the abdomen, and two to st. At some point during or following the stabbing, Medi- ose cloth gag in the victim's cording to the medical examin- n took ten to thirty minutes to perienced considerable pain. *reston v. State*, 444 So.2d 939 victim's throat slash d, sur- rcumstances can support find- , atrocious, or cruel); *Peary v.* So.2d 200 (Fla.1983) (stabbing finding heinous, atrocious, or gravation). The record shows . had an obsession for cars and endous desire to own his own ecord supports the conclusion of dge that he killed the victim, w, to obtain her car. He later o sell it to raise bond money for nd. *Compare Middleton v.* So.2d 548 (Fla.1982), *cert. de-* U.S. ——, 103 S.Ct. 3573, 77 13 (1983) (stealing victim's car and selling pistols supports pecuniary gain).

as a behavorial problem. He at he had been hospitalized for blems in Cuba. His actions ap- impulsive at times. The trial idered and weighed both the nd nonstatutory mitigating evi- found that Medina had no signif- criminal history. The trial found, however, that the non- nitigating evidence was entitled eight and that the aggravating es outweighed the mitigating *Compare Foster v. State*, 369 Fla.), *cert. denied*, 444 U.S. 885, 78, 62 L.Ed.2d 116 (1979) (death firmed for stabbing death and en though defendant had exten- y of mental illness).

that no reversible error occurred a trial and that competent, sub- idence supports the convictions ces. We therefore affirm those s and sentences.

ordered.

Cite as 466 So.2d 1051 (Fla. 1985)

BOYD, C.J., and ADKINS, OVERTON, ALDERMAN, McDONALD, EHRLICH and SHAW, JJ., concur.

Charlie Lewis BURR, Appellant,

v.

STATE of Florida, Appellee.

No. 62365.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied April 26, 1985.

Defendant was convicted in the Circuit Court in and for Leon County, Charles E. Miner, Jr., J., of first-degree murder, and he appealed. The Supreme Court, Boyd, C.J., held that: (1) fact that State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to support conviction; (2) there was no evidence that State witness' testimony was made under coercion or duress; (3) evidence of collateral crimes was relevant to establish identity and intent; and (4) trial judge did not err in imposing death sentence over jury's recommendation of life imprisonment.

Affirmed.

Overton and McDonald, JJ., concurred in conviction, but dissented from sentence.

1. Grand Jury ⇐21

Defendant's showing that very few blacks had served as grand jury foremen in county did not constitute a prima facie case of racial discrimination in grand jury foreman selection.

2. Homicide ⇐253(1)

That State's witness recanted her earlier incriminating testimony did not compel finding that there was insufficient competent evidence to convict defendant of first-degree murder.

3. Criminal Law ⇐706(2)

Where witness, who testified against defendant only after being advised by State attorney of consequences of committing perjury and of importance of telling the truth, admitted on cross-examination that State attorney had neither threatened her nor behaved in a hostile manner, and where testimony implicating defendant was consistent with witness' original statements to her friends and police, witness' testimony was not the product of coercion or duress.

4. Criminal Law ⇐369.15, 371(4)

In prosecution for first-degree murder of store clerk during convenience store robbery, evidence of collateral crimes, namely, the testimony of other convenience store clerks to effect that defendant had robbed them, was relevant and admissible to establish identity and intent.

5. Criminal Law ⇐1037.1(2)

Defendant failed to preserve for appellate review issue of whether trial court erred by failing to control State's inflammatory and prejudicial argument, where no objections were made with respect to the comments.

6. Criminal Law ⇐723(4)

Prosecutor's statement that there were people who were scared and that defendant "executes" people was not so unduly inflammatory or prejudicial as to warrant mistrial.

7. Criminal Law ⇐665(4)

Where it was shown that rebuttal witness' testimony was not substantially different from what it would have been had she not heard testimony of witness she was rebutting, trial court did not abuse its discretion in allowing rebuttal witness to testify.

8. Homicide ⇐354

Evidence supported findings that murder of convenience store clerk during robbery was committed for purpose of avoid-

ing lawful arrest and in a cold, calculated and premeditated manner without pretense of any moral or legal justification, both aggravating circumstances used to support death sentence. West's F.S.A. § 921.-141(5)(e), (i).

9. Homicide ⇐354

Trial judge did not err in imposing death sentence over jury's recommendation of life in prosecution for first-degree murder of convenience store clerk during robbery where there were several aggravating circumstances and no mitigating circumstances and there was no reasonable basis for jury to recommend life.

David A. Davis, Asst. Public Defender, Second Judicial Circuit, Tallahassee, for appellant.

Jim Smith, Atty. Gen., and Andrew Thomas, Asst. Atty. Gen., Tallahassee, for appellee.

BOYD, Chief Justice.

This case is before us on appeal of a judgment of conviction of first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const.

Appellant Charlie Burr was indicted for the first-degree murder of a store clerk during a robbery at a convenience store near Tallahassee. At the trial the state's key witness was Domita Williams who testified that she was with appellant the morning of the murder. She testified that they drove to the store where she bought a cheeseburger and candy bar and that when she returned to the car appellant entered the store. She said that she heard a shot and then appellant came out. According to her testimony, they then drove to an apartment where appellant was staying and she told Katrina Jackson and Tammy Footman about the incident. Upon being called as a witness, Katrina Jackson at first denied Williams had told her anything, but after being declared a hostile witness and upon cross-examination by the state, she corroborated Williams' testimony. The state then presented evidence of collateral crimes. Three convenience store clerks from Brevard County testified that appellant robbed and shot them in three separate incidents within a period of nineteen days after the murder charged in the instant case.

The defense called Domita Williams as its main witness. She recanted her earlier testimony and claimed that she was not with appellant the morning of the murder.

In rebuttal the state proffered Tammy Footman's testimony; she had heard the previous day's testimony where Williams had inculpated appellant, but had not heard Williams' recantation. Over appellant's objections, Footman was allowed to testify concerning Williams' statements to her to the effect that she was present at the murder. An investigator was also allowed to testify about Williams' statements to him, which were consistent with her original testimony. An interview of Williams, recorded on audiotape, was played for the jury.

The jury found appellant guilty of first-degree murder and robbery with a firearm. At the sentencing hearing the state presented no additional evidence. The defense presented several witnesses who testified that appellant was a good man and had been raised a Christian. The jury recommended a sentence of life imprisonment.

Notwithstanding the jury's recommendation of a life sentence, the trial judge sentenced appellant to death. In support of his sentence, the judge found as aggravating circumstances that the murder was committed during the course of a robbery, that it was committed to avoid or prevent a lawful arrest, and that it was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. The judge found nothing in mitigation.

[1] Appellant's first argument on appeal is that he was denied due process of law because the selection of grand jury foremen in Leon County is racially discriminatory. Appellant moved to dismiss the indictment, claiming he made a prima facie case of racial discrimination by showing that very few blacks have s
jury foremen in Leon Count
a similar argument in *Ano*
443 So.2d 78 (Fla.1983) and
that the court did not err
motion to dismiss.

[2] Appellant's next ar
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that very few blacks have served as grand jury foremen in Leon County. We rejected a similar argument in *Andrews v. State*, 443 So.2d 78 (Fla.1983), and therefore hold that the court did not err in denying the motion to dismiss.

[2] Appellant's next argument is that there is insufficient competent evidence to support affirmance of his conviction and that in the interest of justice he should be granted a new trial. *See* Fla.R.App.P. 9.140(f). Appellant concedes that there is legally sufficient evidence, in the form of Ms. Williams' testimony, to support his conviction, but that such evidence is not competent since Ms. Williams recanted her earlier incriminating testimony. He argues that a witness cannot be considered credible when giving one story and incredible when giving another. The logical conclusion of appellant's argument is that juries must believe all or none of a particular witness's testimony. The fallacy of this conclusion is self-evident. Obviously, a witness can tell the truth about some matters and lie about others. In this case, to reach a verdict of guilty, the jury had to believe Ms. Williams' original testimony and disbelieve her recantation. It is not this Court's function to reweigh the evidence, but only to ensure its legal sufficiency. *Tibbs v. State*, 397 So.2d 1120 (Fla. 1981), *aff'd*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). The evidence was legally sufficient, and we do not find that the interests of justice require a new trial in this case.

[3] Appellant also argues that the conviction should be reversed in the interest of justice because Ms. Williams originally testified under duress. The record shows that on the day of the trial Ms. Williams indicated for the first time that her testimony would not implicate appellant. The state attorney then conferred with her and advised her of the consequences of committing perjury and of the importance of telling the truth. After this conversation, Ms. Williams testified as originally expected. During her recantation she explained that she had changed her mind and agreed to testify against appellant because the state attorney was furious with her and had threatened to put her in jail. However, on cross-examination by the state, Ms. Williams testified that the state attorney had neither threatened her nor behaved in a hostile manner but had merely emphasized the importance of telling the truth. This admission and the fact that her testimony implicating appellant was consistent with her original statements to her friends and the police belie appellant's contention that Ms. Williams' testimony was the product of coercion or duress.

[4] Appellant's next point on appeal is that the trial court erred by allowing into evidence the testimony of the other convenience store clerks to the effect that he had robbed them. Appellant contends that their testimony was not relevant to any issue of material fact. The state responds that such evidence was relevant to show identity, by showing the similarities between those shootings and this one, and to prove appellant had the intent to kill the victim. The state attempted to prove this latter element through the testimony of one of the other convenience store clerks who testified that appellant told him he was going to kill him.

We find that this evidence of collateral crimes was relevant to establish identity and intent and was therefore properly admitted. *Williams v. State*, 110 So.2d 654 (Fla.), *cert. denied*, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959); § 90.404(2)(a), Fla.Stat. (1981). Since this evidence did not become a major feature of appellant's trial, appellant was not improperly prejudiced by its admission. *See Williams v. State*, 117 So.2d 473 (Fla.1960).

[5] Appellant next argues that the court erred by failing to control the state's inflammatory and prejudicial argument. However, no objections were made with respect to the comments appellant now complains about, except for one of them. We therefore find that this point has not been properly preserved with respect to most of the comments appellant now claims

were improper. *See e.g. Steinhorst v. State*, 412 So.2d 332 (Fla.1982).

[6] The one comment appellant did object to was the prosecutor's statements that there were people who were scared in this case and that appellant "executes" people. The trial judge ruled that such statements were a fair comment upon the evidence and denied appellant's motion for a mistrial. We do not find these statements to have been so unduly inflammatory or prejudicial as to warrant a mistrial. *See Blair v. State*, 406 So.2d 1103 (Fla. 1981).

[7] Appellant's final argument with respect to the validity of his conviction is that the trial court erred in allowing a witness to testify in violation of the rule of sequestration. After Ms. Williams recanted and testified for the defense, the state called Tammy Footman as a rebuttal witness. Appellant objected on the grounds that Ms. Footman had been present during Ms. Williams' original testimony. The state proffered Ms. Footman's testimony, and the trial court ruled that only that part of her testimony that was consistent with her previous statement could be admitted. Because it was thus shown that Ms. Footman's testimony was not substantially different from what it would have been had she not heard Ms. Williams' testimony, the trial court did not abuse its discretion in allowing her to testify. *Steinhorst v. State; Dumas v. State*, 350 So.2d 464 (Fla. 1977).

[8] With respect to his sentence, appellant claims that the trial judge erred in finding that the murder was committed for the purpose of avoiding a lawful arrest and in finding that it was committed in a cold, calculated and premeditated manner without pretense of any moral or legal justification. *See* § 921.141(5)(e), (i), Fla.Stat. (1981). In support of his findings, the trial judge found that the pattern of shooting store clerks during the commission of robberies exhibited an intent to eliminate witnesses. The judge also found that the position of the victim's body, indicating the victim was shot in the back of the head while kneeling down, supported the conclusion that the murder was committed in the manner of an execution. We find no error in these findings.

[9] Finally, appellant claims that the trial judge erred in imposing the death sentence over the jury's recommendation of life. Appellant claims that reasonable people could differ as to the appropriate punishment because Ms. Williams' recantation created some doubt, albeit not a reasonable doubt, that appellant had indeed committed the murder. However, a "convicted defendant cannot be 'a little bit guilty.' It is unreasonable for a jury to say in one breath that a defendant's guilt has been proved beyond a reasonable doubt and, in the next breath, to say someone else may have done it, so we recommend mercy." *Buford v. State*, 403 So.2d 943, 953 (Fla. 1981), *cert. denied*, 454 U.S. 1163, 102 S.Ct. 1037, 71 L.Ed.2d 319 (1982). There were several aggravating circumstances and no mitigating circumstances, so death was to be presumed the appropriate penalty. *State v. Dixon*, 283 So.2d 1 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). Moreover, there was no reasonable basis, discernible from the record, for the jury to recommend life. Therefore the judge was justified in overruling the jury's recommendation. *See, e.g., Stevens v. State*, 419 So.2d 1058 (Fla. 1982), *cert. denied*, 459 U.S. 1228, 103 S.Ct. 1236, 75 L.Ed.2d 469 (1983); *Hoy v. State*, 353 So.2d 826 (Fla.1977), *cert. denied*, 439 U.S. 920, 99 S.Ct. 293, 58 L.Ed.2d 265 (1978).

The aggravating circumstances adequately established and properly found by the sentencing court were:

(1) that the murder was committed in the course of a robbery;

(2) that the murder was committed for the purpose of avoiding arrest and prosecution;

(3) that the murder was committed in a cold, calculated, and premeditated manner without pretense of moral or legal justification.

There were no mitigating c
A sentence of death in this c
ent with capital sentencing
this Court in similar cases

The judgment of conviction
tence of death are affirmed.

It is so ordered.

ALDERMAN, EHRLICH
JJ., concur.

OVERTON and McDONAL
in the conviction, but dissent
tence.

In re ESTATE OF
GAINER, Decea

Carol GAINER, Individua
sonal Representative of
Holly E. Gainer, A

v.

Dorothy DORAN a
Adams, Appell

No. 64,874

Supreme Court of

Feb. 14, 19

Rehearing Denied M

Appeal was taken fr
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joint holder. The District
443 So.2d 473, held that
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There were no mitigating circumstances. A sentence of death in this case is consistent with capital sentencing approved by this Court in similar cases.

The judgment of conviction and the sentence of death are affirmed.

It is so ordered.

ALDERMAN, EHRLICH and SHAW, JJ., concur.

OVERTON and McDONALD, JJ., concur in the conviction, but dissent from the sentence.

In re ESTATE OF Holly E. GAINER, Deceased.

Carol GAINER, Individually and as Personal Representative of the Estate of Holly E. Gainer, Appellant,

v.

Dorothy DORAN and Mary Adams, Appellees.

No. 64,874.

Supreme Court of Florida.

Feb. 14, 1985.

Rehearing Denied May 1, 1985.

Appeal was taken from judgment of the Circuit Court, Brevard County, Clarence T. Johnson, Jr., J., holding that testator's assets in federal savings and loan association account belonged to surviving joint holder. The District Court of Appeal, 443 So.2d 473, held that Savings Association Act unconstitutionally denied equal protection to beneficiaries, and personal representative appealed. The Supreme Court, Alderman, J., held that Savings Association Act's conclusive presumption that, absent fraud, joint accounts vest in survivor did not violate equal protection.

Decision of District Court of Appeal reversed in part and cause remanded.

Ehrlich, J., filed dissenting opinion.

1. Joint Tenancy ⇐6

Statute creating conclusive presumption that, absent fraud, joint accounts held in federal savings and loan associations would vest in survivor was intended to provide certainty as to nature of joint account with right of survivorship which it encompassed. West's F.S.A. § 665.063(1)(a).

2. Joint Tenancy ⇐6

Legislature had authority to enact statute creating conclusive presumption that, absent fraud, joint accounts in federal savings and loan associations would vest in survivor. West's F.S.A. § 665.063(1)(a).

3. Joint Tenancy ⇐2

For purposes of equal protection analysis, classifications established by Savings Association Act and banking code concerning entitlement to assets held in joint accounts were depositors in federal savings and loan associations on the one hand and depositors in state banks, rather than testamentary beneficiaries, on the other hand. F.S.1979, §§ 659.291, 665.271; West's F.S.A. § 665.063(1)(a).

4. Constitutional Law ⇐213.1(1)

Classification within context of equal protection clause is the grouping of things because they agree with one another in certain particulars and differ from other things in those particulars. U.S.C.A. Const.Amend. 14; West's F.S.A. Const. Art. 1, § 2.

5. Constitutional Law ⇐48(6)

Party who challenges classification within context of equal protection clause has burden of proving that it does not rest upon reasonable basis. U.S.C.A. Const. Amend. 14; West's F.S.A. Const. Art. 1, § 2.

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DEPT. OF LEGAL AFFAIRS
CRIMINAL DIVISION

IN THE SUPREME COURT OF FLORIDA

FRIDAY, APRIL 26, 1985

CHARLIE LEWIS BURR,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 62,365

Circuit Court Case No. 81-183
(Leon County)

Received
5-1-1985
Florida Attorney General

On consideration of the motion for rehearing filed by attorney for appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD C.J., ALDERMAN, EHRLICH and SHAW, JJ., Concur
OVERTON and McDONALD, JJ., Dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By Clerk

cc: Hon. Paul F. Hartsfield, Clerk
Hon. Charles E. Miner, Jr., Judge

David A. Davis, Esquire
Gregory G. Costas, Esquire